FILE COPY

FILED
APR 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1277

ROBERT V. RAFTER,

Petitioner,

—v.—

FLOYD BLACKMON and KOIZIM and DAVIDOFF,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

G. WHITNEY BIGGS,
PULLMAN, COMLEY, BRADLEY & REEVES
855 Main Street
Bridgeport, Connecticut 06604
Attorneys for Respondents
Harvey Koizim and Jerry Davidoff

INDEX

PAGE

Table of Authorities ii

Opinion Below 1

Questions Presented 1

Statement of Case 2

ARGUMENT

POINT I—

The petitioner, having given a Covenant Not To Sue to the undersigned respondents, cannot now pursue this action 5

POINT II—

The petitioner has not filed a timely petition for a writ of certiorari and, therefore, is not entitled to review 6

POINT III—

The petitioner has not raised special and important reasons justifying review by this Court 7

CONCLUSION 8

APPENDIX

Covenant Not To Sue 9

Table of Authorities

PAGE

Cases:

Bonczkiewicz v. Merberg Wrecking Corporation, 148 Conn. 573, 581 (1961) 5

Chin Gum v. United States, 150 F.2d 765 (1945) 6

Conboy v. First National Bank, 27 S. Ct. 50, 203 U.S. 141, 51 L. Ed. 128 (1906) 6

Dwy v. Connecticut Co., et als., 89 Conn. 74 (1915) 5

Hines v. Seaboard Air Line Railroad Company, 341 F.2d 229 (1965) 6

National Labor Relations Board v. Brown & Root, Inc., 206 F.2d 73 (1953) 7

Safeway Stores v. Coe, 136 F.2d 771 (1943) 6

Statutes:

Title 28 U.S.C. 2101 (c) 6

Rules:

U.S. Sup. Ct. Rule 19, 28 U.S.C. 7

F.R.A.P. Rule 40(a), 28 U.S.C. 6

F.R.C.P. 73(a), 28 U.S.C. 6

In the

Supreme Court of the United States

October Term, 1972

No. 72-1277

Robert V. Rafter,

Petitioner,

—v.—

Floyd Blackmon and Koizim and Davidoff,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondents, Koizim and Davidoff, hereby oppose the petitioner's prayer for a writ of certiorari filed on March 17, 1973 and request that said petition be denied.

Opinion Below

The decision of the United States Court of Appeals for the Circuit in denying the petitioner's motion under Rule 27(b) of that Court is set forth in the petitioner's Appendix (Pet. App. A1).

Questions Presented

1. May the petitioner seek review of the denial of his motion to reinstate and reargue his appeal by the United States Court of Appeals for the Second Circuit after having

signed, subsequent to the decision of that Court on the original appeal, of a Covenant Not To Sue running to the benefit of the respondents?

2. May a petition for a writ of certiorari be filed 90 days after the denial by the United States Court of Appeals for the Second Circuit of a motion to reinstate and reargue an appeal decided by that Court more than five years previously?

3. Has the petitioner raised special and important reasons justifying review by this Court?

Statement of Case

The following sets forth the facts as they were presented to the United States District Court for the District of Connecticut and set out in the ruling of that Court on the motion for summary judgment of the respondents.

In December of 1964, the undersigned respondent attorneys were retained by Leo Spiegelman with respect to a claim involving the petitioner. The petitioner had leased property from Mr. Spiegelman, and a dispute had arisen over the payment of rent and damage to Mr. Spiegelman's property by the petitioner.

On December 10, 1964, Vincent S. Tirola, an attorney associated with the undersigned respondents, issued a writ, summons and complaint, returnable to the Court of Common Pleas, Fairfield County, at Stamford on the second Tuesday of January, 1965 naming Mr. Spiegelman as plaintiff and the petitioner as defendant. Service was made by the respondent, Floyd Blackmon, a deputy sheriff for Fairfield

County, who first made a garnishment of approximately $200 in the Fairfield County Trust Company, Norwalk, Connecticut and subsequently attachment of the petitioner's automobile, before making service upon the petitioner, all in accordance with the applicable Connecticut statutes.

The original writ, summons and complaint was thereafter filed in the Clerk's Office of the Court of Common Pleas at Stamford, also in accordance with the applicable Connecticut statute. Numerous motions were thereupon filed and ruled upon, and on May 13, 1965, the respondents withdrew that action, at the same time instituting an identical action against the petitioner, in which the identical garnishment, attachment and service upon the petitioner were made.

On May 31, 1966, the petitioner instituted action against the respondents herein, claiming that the respondents conspired to deprive the petitioner of certain of his civil rights by issuing and executing an invalid writ of attachment, wrongfully seizing his property, wrongfully withdrawing the first state lawsuit, improperly reattaching his property and by committing perjury in testimony before the Court of Common Pleas in the state action. That complaint appears in the Appendix to the petition herein (Pet. App. A8).

Denials of the material allegations of the petitioner's complaint were filed by the respondents, and after very extensive discovery, all respondents moved for summary judgment which was granted by Judge Zampano in a memorandum of decision dated April 26, 1967 (Pet. App. A12-A17). Judgment was entered dismissing the action the following day (Pet. App. A18).

The petitioner thereafter appealed to the United States Court of Appeals for the Second Circuit. Oral argument

was held on the appeal on November 30, 1967, and after full argument, the judgment of the United States District Court was unanimously affirmed from the bench (Lumbard, Medina and Hays, JJ). No review of that decision was sought by the petitioner until November 29, 1972, when he filed the motion to recall the mandate and for rehearing of the appeal (Pet. App. A2-A7). This motion was denied by an order of the Court on December 19, 1972 (Pet. App. 9).

On January 17, 1968, after the United States Court of Appeals for the Second Circuit had decided the petitioner's appeal from the United States District Court in this action, the state action in the Court of Common Pleas at Stamford was assigned. After settlement negotiations, the state action was disposed of and withdrawn. In connection with the settlement of the action in the Court of Common Pleas and in consideration of the withdrawal of that action, the petitioner signed and delivered a Covenant Not To Sue running to Harvey L. Koizim, Jerry Davidoff and Vincent Tirola, *inter alia*, in which the petitioner agreed to refrain forever from pressing any claim, demand, action or cause of action whatever against the respondents (Resp. App. A1).

Thereafter, on March 17, 1973, the petitioner filed the instant petition for a writ of certiorari.

POINT I

The petitioner, having given a Covenant Not To Sue to the undersigned respondents, cannot now pursue this action.

The petitioner gave a Covenant Not To Sue to the undersigned respondents on January 17, 1968 (Resp. App. A1). The effect of the giving of this covenant was to release the respondents, Koizim, Davidoff and their employee, Tirola, *inter alia* from any further claims whatever by the petitioner.

While under Connecticut law the effect of a Covenant Not To Sue is limited to those to whom the covenant is given, it is clear that a Covenant Not To Sue operates as a full release and discharge as to these persons. See *Bonczkiewicz* v. *Merberg Wrecking Corporation,* 148 Conn. 573, 581 (1961) and *Dwy* v. *Connecticut Co., et als.,* 89 Conn. 74 (1915), and cases cited therein.

The petitioner has, therefore, by his own act barred himself from making further claim against the undersigned respondents, and is, therefore, not entitled to pursue this petition as to them.

POINT II

The petitioner has not filed a timely petition for a writ of certiorari and, therefore, is not entitled to review.

The petitioner did not file a timely petition for a writ of certiorari within 90 days from November 30, 1967, the date on which the United States Court of Appeals entered its judgment affirming the decision of the United States District Court. 28 U.S.C. 2101(c). Nor was a timely motion for a rehearing filed with the Court of Appeals pursuant to the applicable rules, nor was the time for the filing of such a petition enlarged by any order. F.R.A.P. Rule 40(a), 28 U.S.C. The time for filing a petition for a writ of certiorari was, therefore, not extended. The time for review by this Court of the final judgment on the appeal to the United States Court of Appeals has, therefore, long passed.

In addition, the order entered on December 19, 1972 denying the petitioner's motion to recall the mandate and for a rehearing on his appeal was not reviewable. *Conboy* v. *First National Bank,* 27 S. Ct. 50, 203 U.S. 141, 51 L. Ed. 128 (1906); *Safeway Stores* v. *Coe,* 136 F.2d 771 (1943); see also, *Hines* v. *Seaboard Air Line Railroad Company,* 341 F.2d 229 (1965), F.R.C.P. 73(a), 28 U.S.C.; nor can the later filing of a motion for a rehearing revive the jurisdiction of this Court to entertain a petition for a writ of certiorari. *Chin Gum* v. *United States,* 150 F.2d 765 (1945). On these grounds, as well, the petition should be denied.

POINT III

The petitioner has not raised special and important reasons justifying review by this Court.

Even if the petitioner was able to surmount the hurdles stated hereinabove, his cause does not raise any issue warranting review by this Court.

The petitioner here states that he is seeking review of the denial of this motion for a rehearing. The purpose of a petition for rehearing is to direct the Court's attention to some material matter of law or fact which was overlooked at the time of the decision on the case, and which, had it been given consideration, would probably have brought about a different result in the case. See, for example, *National Labor Relations Board* v. *Brown & Root, Inc.*, 206 F.2d 73 (1953). In his motion for a rehearing, however, the petitioner failed to point out any matter of fact or law which was overlooked by the Court in deciding his appeal.

Review on writ of certiorari will only be granted where "special and important" reasons exist for the same, for instance where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals or where an important question of federal law has been decided which has not been settled by this Court. U. S. Sup. Ct. Rule 19, 28 U.S.C. Petitioner has raised no such issue in this case; rather, he admits that he seeks review of a garnishment and attachment released over five years ago, in a case in which he gave a Covenant Not To Sue to these respondents.

The decisions of the lower courts speak for themselves; they were correct applications of the law as the law existed at the time the decisions were rendered. The petitioner pursued his rights of review to the extent he wished at the time; he has not raised any important federal question here, and he is not entitled to review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

G. Whitney Biggs,
Pullman, Comley, Bradley & Reeves
855 Main Street
Bridgeport, Connecticut 06604
Attorneys for Respondents
Harvey Koizim and Jerry Davidoff

APPENDIX

COVENANT NOT TO SUE

I, ROBERT V. RAFTER of Weston, in the Count yof Fairfield and State of Connecticut for myself, my heirs, executors and administrators, in consideration of One Dollar and and Other Valuable Consideration to me paid by HARVEY L. KOIZIM, JERRY DAVIDOFF, VINCENT TIROLA, A. REYNOLDS GORDON, G. WHITNEY BIGGS, PULLMAN, COMLEY, BRADLEY & REEVES, and SIDNEY H. REICH of White Plains, New York the receipt of which is hereby acknowledged, do by this instrument covenant with said Attorneys forever to refrain from instituting, pressing or in any way aiding any claim, demand, action or cause of action for damages, cost, loss of service, expenses or compensation which against said persons I ever had, now have, or shall have or may have from the beginning of the world to the day and date of these presents; reserving, however, all rights against Deputy Sheriff Floyd E. Blackmon, the State of Connecticut, and all rights against all other persons, corporations, partnerships and associations, and legal entities of any kind whatsoever.

WITNESS my hand and seal this 17th day of January in the year 1968.

In presence of,

/s/ MARY C. CHALMERS

/s/ ROBERT V. RAFTER (L.S.)
Robert V. Rafter